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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 642

INGRAM-DAY LUMBER COMPANY, PETITIONER

v.

SYDNEY C. MCLOUTH (REVIVED AGAINST THE AMERICAN LOAN AND TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF SYDNEY C. MCLOUTH, DECEASED)

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

I

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Sixth Circuit, affirming the judgment of the District Court, appears at pages 74–79 of the Transcript of Record, and is reported in 13 F. (2nd) 581. The opinion of the District Court appears at pages 35–39 of the Transcript of Record, and is reported in 6 F. (2nd) 471.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 30, 1926. (R. 73.) The petition for certiorari was filed on September 16, 1926.

THE QUESTION

The only substantial question involved in this case is whether upon cancellation by the Government of a contract for the construction of vessels for it, as authorized by subdivision (b) of the Emergency Shipping Fund provisions of the Urgent Deficiencies Appropriation Act of June 15, 1917 (c. 29, 40 Stat. 182), and the cancellation by the contractor, pursuant to the directions of the Government, of a subcontract for the manufacture of materials to be used in the performance of the main contract, the subcontractor is entitled to recover from the main contractor for the loss of profits which might have been earned upon completion of the subcontract.

STATEMENT

The United States Shipping Board Emergency Fleet Corporation, acting on behalf of the United States, canceled, as authorized by subdivision (b) of the Emergency Shipping Fund provisions of the Urgent Deficiencies Appropriation Act of June 15, 1917 (c. 29, 40 Stat. 182), a contract between it and McLouth, under which McLouth was to build certain wooden ocean-going tugs, and directed McLouth to notify all subcontractors affected by the

cancellation. (R. 53–55.) This was the method usually employed by the Emergency Fleet Corporation in canceling subcontracts. (R. 53.) Pursuant to such directions McLouth canceled his contract with petitioner, under which petitioner was to furnish certain lumber to be used in the performance of the main contract. (R. 48.) This lumber was to be manufactured in special sizes and shapes, not suitable for petitioner's regular trade. (R. 5–13, 48.) All lumber manufactured and delivered prior to the cancellation of petitioner's contract was paid for by McLouth, but in addition to the lumber manufactured and delivered, petitioner at that time had partially manufactured other lumber for delivery under its contract with McLouth. (R. 47.) After the cancellation of the contract between McLouth and petitioner the undelivered lumber was remanufactured for sale in petitioner's regular trade and was sold in the ordinary course of its business. (R. 48.)

Petitioner brought suit against McLouth in the United States District Court for the Eastern District of Michigan for the alleged breach of its contract with him. (R. 1–14.) After the suit was commenced McLouth died, and the suit was revived against the American Loan and Trust Company, his administrator. (R. 16–22.) Trial by jury was waived and the parties stipulated that the issues of fact might be tried and determined by the court. (R. 23.) The court made the following findings of fact (R. 36):

(1) That at the time plaintiff's contract was entered into with McLouth the plaintiff knew that the lumber was to be furnished for the building of tugs, but did not know that McLouth had a contract with the Fleet Corporation, or that the tugs were being built for the Fleet Corporation.

(2) That if plaintiff's lost profits constitute a proper element of damage that plaintiff's total damages amount to the sum of forty-two thousand seven hundred and eighty-nine dollars and ninety-six cents.

(3) That if plaintiff's lost profits under the contract are not an element of damage that the plaintiff is entitled to the sum of six hundred and forty-seven dollars and sixty-five cents, with interest from the date of the suspension of the contract.

The court held that the petitioner's lost profits were not recoverable and rendered judgment for the petitioner for six hundred and forty-seven dollars and sixty-five cents. (R. 36–39.) The case was taken to the Circuit Court of Appeals by petitioner by writ of error, and the Circuit Court of Appeals affirmed the judgment of the District Court. (R. 73.)

THE STATUTES

The applicable portions of the Emergency Shipping Fund provisions of the Urgent Deficiencies Appropriation Act of June 15, 1917, are as follows (40 Stat. 182, 183):

The President is hereby authorized and empowered, within the limits of the amounts herein authorized— * * *

(b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material. * * *

* * * * *

Whenever the United States shall cancel, modify, suspend, or requisition any contract, make use of, assume, occupy, requisition, acquire, or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

The President may exercise the power and authority hereby vested in him and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time.

PETITIONER'S CONTENTION

Petitioner does not question that the Emergency Fleet Corporation had power, as an agency of the President, under the statute quoted above, to cancel the contract between it and McLouth. Nor does it question that anticipated profits are not an element of just compensation for cancellation of a contract pursuant to the statute. *Russell Co.* v. *United States*, 261 U. S. 514, 523. The sole substantial contention of petitioner, stated in its brief in many different ways, is that since the subcontract here in question between McLouth and petitioner was a contract between private individuals which did not refer to the contract between McLouth and the Emergency Fleet Corporation, and petitioner did not know of the latter contract, the Urgent Deficiencies Appropriation Act of June 15, 1917, did not authorize the cancellation of the subcontract, and that petitioner is therefore entitled to recover damages for breach thereof and not merely just compensation for its cancellation.

ARGUMENT

The petitioner's contention is practically disposed of by the opinion of this Court in *Russell Co.* v. *United States*, 261 U. S. 514. The contention in that case was that power to cancel contracts under subdivision (b) of the Emergency Shipping Fund provisions of the Urgent Deficiencies Appropriation Act of June 15, 1917, was restricted to private contracts and did not apply to contracts to which

the United States was a party. The Court said (page 519):

> It must be apparent, we think, that the words of the provision, "*any* existing or future contract," read with literal exactness, include all contracts, whether private or governmental. But it is pointed out that the power to "requisition" can not apply to a governmental contract; and this may be conceded, since the Government can not requisition what it already has. Then it is said that inasmuch as the application of the word "requisition" must be confined to private contracts, the other words associated with it must be likewise restricted by virtue of the maxim *Noscitur a sociis*.

On pages 520–521 the Court disposed of this contention as follows:

> There is nothing in the rule or in the statute which requires us to assimilate the words "modify" and "cancel" to the scope of the word "requisition," simply because the latter has a necessarily narrower application. The meaning of the several words, standing apart, being perfectly plain, what should be done is to apply them distributively, *diverso intuitu*, giving to each its natural value and appropriate scope when read in connection with the object (any contract) which they are severally meant to control. Thus, the predicate "requisition" will be limited to private contracts, while the other words may be appropriately extended to include governmental contracts as well.

The court further said, on pages 521–522:

> This disposition of the question also accords with the broad purposes of the legislation. When the act was passed we were in the midst of a great war, which called for the utilization of all our resources. The necessities were great, beyond the power of statement. The Government was confronted with the vital necessity not only of producing ships and supplies in unprecedented quantities, but of producing them with the utmost haste. Hence it was necessary that everything which stood in the way of or hindered such production should be put aside. But this was a necessity which Congress, of course, realized must sooner or later come to an end, suddenly and completely. With the termination of the war the continued production of war supplies would become not only unnecessary but wasteful. Not to provide, therefore, for the cessation of this production when the need of it had passed would have been a distinct neglect of the public interest. The situation, it is plain, required that production should proceed while the war lasted to the utmost limit of the Nation's power, but that it should come to an end as soon as possible upon the passing of the emergency. In the light of these circumstances it is not unreasonable to regard the statute now under consideration as intended to accomplish both results; that is, (1) to enable the President, during the emergency, to utilize his powers over contracts to stimulate production to the utmost,

and then, (2) upon the passing of the emergency, to enable him to utilize these same powers to stop that production as quickly as possible.

The holding of the Court in the *Russell case*, therefore, is that the President, or his authorized agent, had power under the statute to cancel *any* contract, public or private, (1) during the emergency, to stimulate production to the utmost, and (2) upon the passing of the emergency to stop that production as quickly as possible. The argument of the petitioner that there was no authority for the cancellation of the subcontract in this case, because it did not refer to the principal contract and the petitioner did not know of the principal contract, rests upon an entire misconception of the nature of the power of cancellation granted by the statute. This power is one of eminent domian; it does not rest upon any notice to or consent by the party affected by the cancellation. See *Russell Co.* v. *United States*, *supra.*, at page 523. Petitioner's argument, in effect, is that the Government can not exercise the power of eminent domain to take or destroy property unless the owner of the property, at the time he acquired it, knew of the public necessity which required the taking or destruction. The mere statement of the proposition demonstrates its absurdity. As the Emergency Fleet Corporation was interested in the cancellation of the subcontract and did cancel it, it is entirely immaterial that petitioner had no previous

notice of the interest of the Emergency Fleet Corporation. Cases such as *Guerini Stone Co.* v. *Carlin*, 240 U. S. 264, referred to several times in petitioner's brief, where the question is whether a subcontractor is bound by provisions of the general contract, have, of course, no bearing. There is no claim that petitioner was bound by any provision of the contract between McLouth and the Emergency Fleet Corporation.

The principles stated above were applied in *Todd Dry Dock & Construction Corporation* v. *Sumner Iron Works* (C. C. A., 9th Circuit), 289 Fed. 217; certiorari denied, 263 U. S. 700. In that case it appeared that the Emergency Fleet Corporation had entered into a contract with the Todd Corporation for the construction of certain vessels, and the Todd Corporation had entered into a contract with the Sumner Iron Works to furnish certain materials for the vessels. The Fleet Corporation cancelled the contract with the Todd Corporation and directed the Todd Corporation to notify all subcontractors affected by the cancellation. Notice of cancellation was duly given by the Todd Corporation to the Sumner Iron Works. The Sumner Iron Works thereafter sued the Todd Corporation to recover damages for the breach of the subcontract. The only question was whether the Sumner Iron Works could recover for anticipated profits, since it had already received more than the amount of all of

its other claims. The court held that there could be no recovery. After referring to the Act of June 15, 1917, it said (pages 219–220):

> The duration of the war and the necessities of the government were both uncertain, and it was the part of prudence on the part of Congress to provide for the cancellation of all contracts imposing future obligations upon the government as soon as public safety and public necessity would permit. The act should receive a liberal construction to that end, and the construction placed upon it by the department charged with its execution is of great weight. The authority to suspend or cancel extended, in our opinion, not only to the principal contract, but to all subcontracts for material and labor, the performance of which would impose further obligations upon the government.
>
> We are not now directly concerned with the claim of the Todd Corporation against the Fleet Corporation or against the United States; but, if the present judgment is permitted to stand, how can the amount of the judgment be excluded from the just compensation to which the Todd Corporation is entitled as against the government? It is said that the Todd Corporation should have provided against such a contingency by contract, and, had it done so, the contract price would have been much higher. But the reservation of rights conferred by law is wholly unnecessary. The contract was canceled, not by the Todd Corporation, but by the author-

> ized representative of the President of the United States, and the Todd Corporation was under no obligation to warn the defendant in error that that authority might be exercised at any time. The principal contract itself contained no such reservation. Doubtless the Fleet Corporation deemed the authority reserved by law ample for its protection. That authority is read into every contract, and is notice to all, and is binding upon all.

Petitioner urges that certiorari should be granted because a conflict of decisions exists between the Circuit Court of Appeals for the Sixth Circuit, which rendered the decision in this case, and the Circuit Court of Appeals for the Seventh Circuit, which decided the case of *American Chain Co.* v. *Interstate Iron & Steel Co.*, 291 Fed. 1006; certiorari denied, 263 U. S. 709. An examination of the decision in the *Chain Company case*, however, makes it quite clear that it in no way conflicts with the decision of the Circuit Court of Appeals for the Sixth Circuit in the present case or the decision of the Circuit Court of Appeals for the Ninth Circuit in the *Todd case*.

The Chain Company case was a suit by the seller against the buyer for breach of a contract for the purchase of 4,800 tons of round iron bars of from 1 to 3 inches in diameter, and of such "standard sizes, shapes, and sections as are within seller's regular range of practice." The buyer took and paid for 3,200 tons, and repudiated its obligation to take

and pay for the remaining 1,600 tons. The only asserted defense was that the Emergency Fleet Corporation engaged the Chain Company (the buyer) to furnish 140 anchor chains to be used on troop ships; that the links were to be 2½ inches in diameter; that buyer's contract for iron bars was made for the purpose of getting the material from which to make the anchor chains, as seller well knew; and that after buyer had furnished 70 chains, the United States, through its proper agent, canceled the contract for the remaining 70 chains, and thereupon buyer notified seller that it canceled the contract for the remaining 1,600 tons of bars.

The court, overruling the defense, said, on pages 1007–1008 (italics ours):

> Under the Act of June 15, 1917 (40 Stat. 182), relating to war-time powers of the President, and the Merchant Marine Act of June 5, 1920 (41 Stat. 988), which repealed the Act of June 15, 1917, the President through governmental agencies was authorized to cancel contracts for the purchase of ships or ship material, and if the person who was entitled to "just compensation" was not satisfied with the amount fixed by governmental agencies, he was authorized to sue the United States.
>
> *But no governmental agency ever entered into any contract with this seller of iron bars, or ever directed or required this buyer so to contract, or ever requisitioned or modified or canceled this contract in suit, or ever directed*

or required buyer to modify or cancel this contract.

* * * * *

Of the 3,200 tons taken by buyer, less than 100 tons was of sufficient diameter for the anchor chains called for in buyer's contract with the government. If buyer's specifications for the untaken 1,600 tons had continued at the same ratio, less than 50 tons would have been suitable for the anchor chains. The inference is not a strained one that the bulk of buyer's business was in making chains other than 2½-inch anchor chains.

In the contract not only was there no stipulation that the iron bars were to be used in making 2½-inch anchor chains for troop ships, and that the material should be of quality and size suitable for that purpose, but buyer took the privilege of specifying any sizes it pleased from 1 to 3 inches, and seller made the condition that the bars were to be within its regular range of practice. Therefore seller, instead of being a subcontractor to perform a part within buyer's contract with the government, was an independent seller of the standard product which it was offering generally in the market.

If seller's knowledge that buyer had a contract with the government for anchor chains and would use round-iron bars in making the anchor chains was a justification of buyer's repudiation, then, similarly, seller's unconditioned contract with the furnace company for pig iron could be repudiated, and the furnace company's unconditional

> contract with the mining company for ore could be repudiated, and so on back to the ultimate of rawness in all materials.

The court added that it was not able to see how the Government touched either the subject matter of the contract or the parties in a way to render the contract impossible of performance.

It is clear that the court in the *Chain Company case* did not consider at all the question whether the Emergency Fleet Corporation had power, under the Act of June 15, 1917, to cancel the contract for the iron bars. It was sufficient for the decision that there had been no attempt to effect such cancellation.

The decision of the Circuit Court of Appeals in the present case that the Act of June 15, 1917, authorizes cancellation of any contract, whether or not the United States is a party thereto, and whether it is a principal contract or a subcontract, is in accord with *Russell Co.* v. *United States*, 261 U. S. 514, and *Todd Dry Dock & Construction Corporation* v. *Sumner Iron Works*, 269 Fed. 217, and neither *American Chain Co.* v. *Interstate Iron & Steel Co.*, 291 Fed. 1006, nor any other case which we have found, or to which our attention has been called, supports a conflicting view.

Some of the petitioner's other contentions merit extended consideration. It would probably be enough to say of all of them that they present no question of the class which this Court will grant

certiorari to review. In addition we believe none of them has any merit.

It is not clear from petitioner's brief whether it is contended that the notice given to it by McLouth under directions of the Emergency Fleet Corporation was not sufficient to effect a cancellation by the Emergency Fleet Corporation of the contract between petitioner and McLouth. If such contention is made, it should be noted that the notice was given in the manner usually employed by the Emergency Fleet Corporation in cancelling subcontracts (R. 53), and that a notice given in precisely the same manner was held in the *Todd case* to be a cancellation "not by the Todd Corporation, but by the authorized representative of the President of the United States." In addition, even if the notice was not properly given, and the contract was not canceled, it is clear that the Emergency Fleet Corporation intended, and had the right, to cancel the contract. This right of cancellation, in any event, as said by this Court in *College Point Boat Co.* v. *United States*, 267 U. S. 12, 16—

> operated to curtail the damages recoverable. It limited the value of the plaintiff's right to require performance, and hence the amount and character of the loss for which compensation must be made. Prospective profits were not recoverable.

It was within the discretion of the trial court to permit the respondent to amend its plea after the

trial. *Mexican Central Railway* v. *Duthie*, 189 U. S. 76; *Norton* v. *Larney*, 266 U. S. 511.

The petitioner's argument that "there is still the question whether Congress had the power to deprive a party to a private contract of his property therein, without just compensation," has no possible application to this case. The Act of June 15, 1917, expressly provides for just compensation.

CONCLUSION

The only substantial question in the case has been decided adversely to the petitioner in *Russell Co.* v. *United States*, 261 U. S. 514, and *Todd Dry Dock & Construction Corporation* v. *Sumner Iron Works*, 289 Fed. 217, and there are no conflicting decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER, 1926.

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